



The Florida Senate

Interim Report 2010-102

October 1, 2009

Committee on Agriculture

RESPONSIBILITY FOR PEST CONTROL ACTIVITIES OF EMPLOYEES

Issue Description

The Department of Agriculture and Consumer Services (Department) regulates pest control businesses. Section 482.163, F.S., establishes that the proper performance of pest control activities by a pest control business employee is the responsibility not only of the employee but also of the certified operator in charge. A copy of the statutory section is available for review as appendix item #1. Currently, the certified operator in charge may be disciplined, according to statute, for the pest control activities of an employee. The section also provides that "a licensee may not automatically be considered responsible for violations made by an employee. However, the licensee may not knowingly encourage, aid, or abet violations of the chapter." These violations pertain largely to the pre-treatment of soil to protect newly constructed homes and also the fumigation of existing homes for protection against termite damage.

The Department takes the position that this provision prevents it from taking disciplinary action against business operations (pest control licensees) that have multiple similar violations by employees resulting from ineffective training or supervision. The Department maintains that this provision allows these companies to continue to operate in a manner that results in similar types of violations and therefore poses a risk to consumers.

Background

Section 482.163, F.S., was created in 1992 with the passage of House Bill 2341 (Chapter 92-203, Laws of Florida). Prior to 1992, the disciplinary action provisions of section 482.161, F.S., were interpreted by the Department to allow disciplinary action against business licensees (business owners) in situations where multiple similar violations were committed by business licensees. With the passage of section 482.163, F.S., a licensee explicitly can "not automatically be considered responsible for violations made by an employee. However, the licensee may not knowingly encourage, aid, or abet violations of this chapter." The Department reports that it must have "clear and convincing evidence" a very high standard (the evidentiary standard for administrative action) before it can prevail in an action against a licensee in this matter. See *Ferris v. Turlington*, 510 So.2d 292, 294 (Fla. 1987). It is available for review as appendix item #2.

Senate Bill 868, as passed by the Agriculture Committee during the 2009 Regular Legislative Session, contained provisions that would have authorized disciplinary action against pest control licensees as well as the certified operator in charge for the actions of an employee when the employee violates the provisions of the chapter and associated rules. However, under the proposal if an employee acted outside the course and scope of his employment or was in violation of an employer rule that is consistently enforced by the employer, the licensee would be protected from action by the Department. The Bill did not pass during the legislative session and the issue was assigned to the Agriculture Committee as an interim project.

A few terms were referred to when this matter was considered in committee meetings during the 2009 Regular Legislative Session. Each of the terms is defined in section 482.021, F.S., as to their meaning in the context of the chapter. The terms and their definitions are as follows:

- **Employee** means a person who is employed by a licensee that provides that person with necessary training, supervision, pesticides, equipment, and insurance and who receives compensation from and is under the personal supervision and direct control of the licensee's certified operator in charge and from

whose compensation the licensee regularly deducts and matches federal insurance contributions and federal income and Social Security taxes.

- **Identification cardholder** means an owner or employee to whom a current card has been issued by the Department identifying the holder to the public or to any law enforcement officer or any agent of the Department charged with, or entitled to exercise any function in connection with, the enforcement of this chapter and any rules made pursuant to this chapter.
- **Certified operator** means an individual holding a current pest control operator's certificate issued by the Department.
- **Certified operator in charge** means a certified operator:
 - (a) Whose primary occupation is the pest control business;
 - (b) Who is employed full time by a licensee; and
 - (c) Whose principal duty is the personal supervision of the licensee's operation in a category or categories of pest control in which the operator is certified.
- **Licensee** means a person, partnership, firm, corporation, or other business entity having a license issued by the Department for engaging in the business of pest control at a particular business location.

Business Licensure under the Florida Structural Pest Control Act

In order to conduct pest control in Florida, a person or corporation must have a business license issued by the Department. Each location from which pest control business is conducted must have a separate business license, even if the separate locations have a common owner. The term “business licensee” means a specific business location. For example, if a company has ten branch locations in Florida, the company must have ten individual business licenses. Each licensed location is treated as a separate entity by the Department for administrative and disciplinary purposes.

Each licensed business location must employ a person who is certified in the category of pest control performed by that location as the certified operator in charge (COIC). There are four categories of certification – General Household Pest and Rodent Control, Termite and Other Wood-Destroying Organisms Control, Lawn and Ornamental Pest Control, and Fumigation. One person can be certified in all four categories and serve as the COIC for all categories, or a business licensee can have separate persons in each category.

To become a certified operator, a person must have three years of experience (there are some equivalency provisions) in pest control in Florida and pass an examination administered by the Department in the category for which they seek certification. The examinations cost a one time fee of \$300 per category.

Each person employed by a licensee who conducts pest control, including the COIC, must have an identification card issued by the Department. It is the responsibility of both the business licensee and the COIC to obtain the identification card for the employee. The identification cards are not transferrable between licensed locations, even if the locations have a common owner.

The business licenses, certifications, and identification cards must be renewed annually. The cost for initial issuance and renewal for each license is identical. Business licenses cost \$300, pest control operator certificates cost \$150, and identification cards cost \$10. To renew the business license, the owner must provide proof of insurance as required in the statute (currently \$100,000/\$300,000 for bodily injury and \$50,000/\$100,000 for property damage).

Certified operators must obtain continuing education hours to renew (two hours of continuing education training in pesticide safety or integrated pest management, and two hours in each category of pest control for which they are certified). Identification cardholders must obtain two hours of continuing education in pesticide safety or integrated pest management in order to have their card renewed.

The Department also issues Special Identification Cards to qualified individuals who have passed an examination for the purpose of overseeing structural fumigations under the supervision of a COIC. There are also two Limited Certification Categories to allow limited pest control by employees of government agencies (such as schools) or businesses on their own property, and to allow some limited landscape pest control. Neither of these certifications allows the operation of a commercial pest control business.

In Fiscal Year (FY) 2008-2009 the Department issued 3,441 business licenses, 4,536 certificates for certified operators, and 25,272 identification cards. There were 2,544 limited certifications issued, and 157 Special ID cards. An analysis of the business licenses locations (3,832 at the time of the analysis in early 2009) showed the vast majority- 86% (3314/3832) operate as companies with a single business location. There were six companies with twenty or more individual locations, with the maximum being one company with 43 business locations. In terms of employees (identification cardholders) 3,242 of the licensees have ten or less employees, 192 have 25 or more, and six have over 100 employees, with the maximum being 302 employees for one business license. (Note: the number of business licensees at any given time is dynamic and will change as a result of companies opening and closing locations, renewing early or late, etc.).

Inspections and Investigations of Complaints

The Department is authorized to conduct inspections to verify compliance with the statute and the rules regarding pest control, and to investigate complaints from citizens regarding allegations of violations of the statute or rules. The Bureau of Entomology and Pest Control (Bureau), within the Division of Agricultural and Environmental Services administers the statute and rules.

Complaints are received through the Department's toll free helpline (1-800-Help-Fla), and through direct calls to the Bureau, which posts the phone numbers for the headquarters in Tallahassee and the numbers of the field inspectors on its website. When calls are received, the caller is asked if they want to file a complaint or if they want assistance to determine if the pest control activity is in compliance. If a complaint is to be filed, a form is provided (by mail or downloaded from the website) on which basic information is recorded. If the caller only wants to determine if the activity was proper, a compliance assistance request is initiated, in which the inspector will review the pest control activity and advise the consumer if the activity is in compliance. If a violation is noted during this review, an inspection is initiated.

The Bureau is currently developing a risk-based inspection strategy based on the type of pest control activity. Activities or practices with higher levels of non-compliance are identified and inspections are assigned to these activities. Risk assignments are based on type of activity, e.g. structural fumigation, rather than the identity of the licensees or the owners of the business.

Findings and/or Conclusions

Department of Agriculture and Consumer Services

The Department reported that, on numerous occasions attempts have been made to take action against companies with repeated violations of the same type such as the pre-treatment of soil to protect newly constructed homes and also the fumigation of existing homes for protection against termite damage. These attempts have been unsuccessful in the view of the Department as a result of statutory restrictions within section 482.163, F.S. This section makes it clear that a pest control company may not automatically be held liable for violations made by an employee, but the company may not intentionally encourage, aid, or abet the employee in violating the law set out in Chapter 482. For example, some companies appear to the Department to have a business model of deliberately under treating home sites under new construction or inadequately fumigating existing homes for termite protection. If an employee is discovered doing this by the Department, only the identification cardholder or a certified operator can be held responsible, not the licensee unless the very high threshold of clear and convincing evidence is met.

Disciplinary Actions

The Department takes administrative (disciplinary) action against licensees and individuals for violations of the statute or rule when clear and convincing evidence is obtained that a violation has occurred. The Department has adopted a rule (Chapter 5E-14.149, Florida Administrative Code) that specifies the penalty to be assigned to a violation. Disciplinary action can include a warning letter, a fine of up to \$5,000 per violation, suspension or revocation of a license. Disciplinary action is taken using the procedures established in Chapter 120, F.S., which provide for adequate notice and the opportunity for informal or formal hearings prior to final action.

Section 482.161, F.S., provides the Department with the authority to take disciplinary action against unlicensed persons, business licensees, certified operators, and identification cardholders for violations. Section 482.163, F.S., establishes that the certified operator in charge may be charged for a violation committed by an employee of a business licensee, but that the business licensee may not be charged unless the licensee “knowingly” aided or abetted the violation. The Department’s view is that as a consequence of this section, licensees can only be charged with a limited number of violations, such as failure to obtain identification cards, issuance of contracts not in compliance with Chapter 482, F.S., or failure to provide information upon written request.

Six hundred twenty-two administrative actions were completed by the Department from July 1, 2006 to June 30, 2009, with 306 (49.2%) being against individual identification cardholders or certified operators and 148 (23.8 %) being against business licensees (the remainder were for unlicensed pest control). The most common violation charged against business licensees during this period was failure to obtain identification cards for employees in a timely manner (37 violations, 25.0%).

Of the actions taken against business licensees in the last three years, only one has been substantially based on a violation of section 482.163, F.S. In this case, evidence was obtained from multiple sources that the licensee was aiding and abetting violations committed by the employees by directing the employees to commit violations and to mislead the certified operator in charge as to the operations conducted by the identification cardholders. The licensee requested an informal hearing with the Department. During the course of this hearing, the licensee was advised of his rights to a formal hearing if he disputed the evidence provided in the affidavits. The licensee then asked if statements would be taken under oath for a formal hearing. When informed that they would, the licensee declined a formal hearing. Due to a total of nine charges of violation of Chapter 482, F.S., (including failure to provide required records, failure to obtain identification cards for employees, and misuse of a certificate), the pest control business license was revoked.

There have been investigations of three licensees whose employees were found to be treating homes at a level below required standards for termite protection. These investigations are examples of situations in which evidence is collected but the Department has determined it is unable to successfully charge the licensee. Combined, these companies were involved in 302 investigations or complaints, and 30 separate administrative actions involving 24 different employees over a period of eight years. The Department has invested major resources, including sworn officers, in these investigations. As a result of the provisions of section 482.163, F.S., the Department could not charge the licensee with violations of pre-treatment requirements, since the Department was not able to develop clear and convincing evidence that the licensees “knowingly” aided or abetted these violations. The Department’s determination was that only the employees could be charged with pre-treatment violations in these cases. During the years these companies were under investigation, their employees performed termite treatments on thousands of homes. If these were done without adequate training and supervision, many of these homes could be inadequately protected against termite damage.

Structural fumigation is the most dangerous pest control activity, and improper practices can lead to severe injury or death. The Department reports that the problem of repeated violations by employees of some companies is not limited to termite preventive treatments. Of 96 violations of structural fumigation rules over the last three years, 70 violations involved companies with more than one violation, and, of these, six companies had four or more violations, including two companies with six violations.

The Department’s position is that under the current language there is a systemic weakness in the statute that

shields licensees (also referred to as companies) from responsibility for the effectiveness of training and supervision. Accordingly, consumer protection depends on enforcement actions against individual technicians, rather than company management. As a result of current statutory language, if supervision or training is inadequate or the company takes short cuts to increase profitability, only the employee is at risk for disciplinary action.

From the perspective of the Department, this allows those licensees that choose to ignore the law for the purposes of profitability to use employees as expendable shields. It also allows licensees that do not choose to invest in adequate training or to exercise proper supervision to operate with little risk. If an employee is found to be in violation, the employee is charged, not the licensee.

Another consequence of the language in section 482.163, F.S., is that consumers cannot readily identify business licensees with employees that have a record of violations. The names of the licensees that employ individuals that are charged with violations are not included on the quarterly disciplinary action list the Department is required to publish. Only the names of the individual employees are published. Therefore, licensees that have multiple instances of employees charged with violations are not identifiable from the published list.

On July 24, 2009 a letter of information was mailed from the Florida Pest Management Association (FPMA) to the members of the committee outlining their interpretation of the statutes on this matter. That information is furnished under the next heading of the report. The complete letter is available for review as appendix item #3. The Department furnished a review of the letter from the FPMA in which the Department did not concur with the FPMA interpretation. This review is available as appendix item #4. The Department's Office of General Counsel also provided a legal opinion on "Interpretation of 482.163, F.S., Relative to Enforcement Actions Against Licensees for Violations Committed by Employees" which also did not concur with the FPMA interpretation. It is available as appendix item #5.

Florida Pest Management Association

In the letter of information from the FPMA to the members of the committee the organization expressed that they were committed "to the overall integrity of the study and recognize its mission to protect the consumers of professional pest control services throughout Florida." An excerpt from the letter follows:

"There are two legal classifications of employees in any Florida pest control company; employees who are independently licensed by the Florida Department of Agriculture Services ("the Department") and those who are not. Identification Cardholders and Certified Operators are company ("licensee") employees who practice pest control and are independently licensed by the Department. Company employees who do not practice pest control, such as administrative assistants and accounting staff, IT personnel, are not required to be licensed or otherwise regulated by the Department. Under current Florida law, a pest control company (a "licensee") is strictly and automatically liable to the Department for the violations of its employees who are licensed by the Department to practice pest control; ID Cardholders and Certified Operators. And while a pest control company is also liable to the Department for the violations of employees who are not licensed by the Department (accountants and administrative staff) that liability is not automatic and may be imposed only after the Department has met its common law and statutory administrative burden of proof.

There are a few specific references in the cover letter and survey distributed by the Senate Agriculture Committee which do not reflect this fundamental aspect of licensee liability. First, in the Committee's cover letter of July 24 to survey respondents, the first sentence of the second paragraph begins, "It is the position of the Department of Agriculture and Consumer Services that under the provisions of section 482.163, F.S., the Department has limited authority to charge a business license owner with a violation as a result of the activities of an Identification Cardholder." FPMA suggests that this statement does not accurately characterize the current debate or the position of the Department. FPMA believes, and further believes that the Department would concur, that the Department currently has the authority to automatically hold a licensee liable for the violations of its employees who are Identification Cardholders as well as Certified Operators.

Secondly, within the survey itself, the first sentence of the second question begins, “Currently Florida law limits the Department of Agriculture and Consumer Services from charging a pest control business license owner with a violation as a result of the action of an employee.” Here, FPMA urges the consideration of this statement with great specificity and particularity. The statement itself is broad and general enough to be considered inaccurate. The only limitation standing between a pest control business licensee and the Department for the violations of ANY employee is the administrative burden the Department must meet before imposing liability on a business licensee for the violations of a non-licensed employee. A pest control business licensee is automatically liable to the Department for the violations of its employees who are also licensed by the Department, ID Cardholders and Certified Operators.”

Pest Control Industry Survey Results

A survey was conducted of pest control business license owners, pest control certified operators, and those who hold a pest control employee identification card. The survey was conducted by the staff of the Senate Committee on Agriculture during the month of August 2009 to obtain the opinions of those involved in professional pest control throughout the state as to whether or not the Department of Agriculture and Consumer Services should be able to charge a pest control business license owner with a violation for the actions of an employee, and if so under what circumstances. Using random sampling, 740 surveys were sent out. Two hundred sixty-four valid responses were received for a 36% response rate. The survey and cover letter are available for review as appendix item #6.

When asked the question, “When should a pest control licensee be able to be charged with a violation for an employee’s actions,” 40.1% of the business owners (licensees) answered “Never.” A smaller percentage of certified operators (20.6%) and identification cardholders (18.6%) answered “Never.” A majority of survey respondents answered the question with “Under Certain Circumstances,” at 53.7% of business owners (licensees), 70.6% of certified operators, and 74.4% of identification cardholders.

Table 1.

When should a pest control licensee be able to be charged with a violation for an employee’s actions?

	Never	Any Offense	Under Certain Circumstances	Total
Licensees’ (Business Owners)	40.1%	6.1%	53.7%	100%
Operators	20.6%	8.8%	70.6%	100%
ID Cardholders	18.6%	7.0%	74.4%	100%
Total	31.4%	7.0%	61.6%	100%

Of those who responded “Under Certain Circumstances,” greater than three-quarters thought it appropriate to charge an owner with a violation when the employee had received inadequate training. Almost 60% thought it appropriate when the employee was following company policy; just under half thought it appropriate when the employee was inadequately supervised; and almost a third thought it appropriate when the employee was acting within the duties of employment. The differences among business owners (licensees), certified operators, and identification cardholders were not significant.

Table 2.

Under what circumstance should a pest control business license owner be able to be charged with a violation for the actions of an employee?

Question	Percent Responding Yes
When employee received inadequate training	77.4%
When employee is following company policy	59.7%
When employee is inadequately supervised	47.2%
When employee is acting within duties of employment	32.7%

National Conference of State Legislatures

The National Conference of State Legislatures confirmed information from the results of a survey that the Department provided to committee staff on various states' authority to charge pest control companies for violations by employees. According to that information, thirty-five states presently provide such authority, six states, including Florida, do not provide such authority, and for nine states there has been no response at this time. Of the southeastern states, only Florida and North Carolina are known to not have such authority, with no response reported for Mississippi.

Consumer Complaints to the Department and Status of Compliance

The Department reported that for the period of July 1, 2004, to June 30, 2009, the Bureau conducted 18,193 inspections and responded to 1,729 consumer complaints. Of these, 395 were resolved as compliance assistance requests. As a result of the inspections and investigations conducted during this five year period 1,800 enforcement actions were taken and \$537,580 in fines issued. A flowchart of Complaint/Request to the Department is available for review as appendix item #7.

The numbers and types of inspections conducted is a function of both routine types of inspections conducted to maintain a regulatory presence and to monitor overall compliance (such as licensee inspections, vehicle inspections, and lawn and ornamental/turf/limited commercial inspections) and "special enforcement operations" (SEOs) which may focus on one area or type of activity for a time (such as pre-construction treatment and fumigation) and types of inspections that may be periodically increased to focus on a particular area (such as post-construction treatment, or contractual). The numbers of inspections for routine types of inspections tends to be similar year to year, while those for SEOs or for areas of increased focus may vary widely from year to year.

The number of contractual inspections, for example, increased dramatically in FY 08-09 as a result of a focus on contracts issued for wood destroying organisms. This focus was needed to determine the level of compliance with changes to contracts required as a result of rule changes adopted in 2008. The number of vehicle inspections dropped from FY 04-05 to the current number as a result of a change in the way these inspections were counted. Prior to FY 06-07, vehicle inspections conducted during licensee inspections were counted as a separate inspection. Only stand alone vehicle inspections are now counted as vehicle inspections. The number of pre/post construction termite inspections has declined recently as a result of the decrease in construction activity. The total number of inspections has declined as a result of two factors – inspections have been changed to be more thorough, and therefore take more time, and there has been a delay in filling vacant field inspector positions as a result of periodic hiring freezes during recent statewide budget shortfalls.

Pest Control Inspection Types and Numbers (Fiscal Years)

Categories*	04-05	05-06	06-07	07-08	08-09	Total
Contractual (WDO)	2	1	1	7	100	111
WDO Reports	0	4	2	1	7	14
Lawn&Ornamental/Turf/ Limited Commercial	421	791	588	559	344	2,703
Notification	2	0	2	1	1	6
Exposure	1	0	0	0	0	1
Misuse	2	1	2	2	1	8
Preconstruction/ Postconstruction Termite	191	114	170	81	87	643
Fumigation	585	429	403	391	442	2,250
Illegal/Unlicensed Ops	58	70	44	64	25	261
Licensee	1,979	1,277	1,572	1,027	1,020	6,875
Certified Applicator Records	12	90	36	40	27	205
Vehicle	1,702	1,055	567	870	762	4,956
Billing Disputes	0	0	1	2	1	4
Other	49	25	16	34	32	156
Totals	5,004	3,857	3,404	3,079	2,849	18,193

Of the complaints received, the largest category consisted of complaints regarding wood destroying organism inspections, contracts, or protection, with 1,036 (59.9 %) complaints. The next largest category was complaints regarding the misuse of pesticides in some manner or failure to provide notification of treatment with 258 (14.9 %). Fifty-two complaints (3.0%) were received regarding treatments to lawn and ornamentals. Other categories of complaints received include – billing disputes (45, 2.6 %), illegal or unlicensed operators (44, 2.5 %), and otherwise categorized (291, 16.8 %).

Pest Control Consumer Complaint Types and Numbers (Fiscal Years)

Categories*	04-05	05-06	06-07	07-08	08-09	Total
Contractual (WDO)/WDO Reports	266	241	228	158	143	1,036
Lawn&Ornamental/Turf/ Limited Commercial	0	1	21	17	13	52
Notification/Exposure/Misuse	72	51	60	36	39	258
Fumigation	0	0	0	3	0	3
Illegal/Unlicensed ops/Licensee	0	2	3	39	0	44
Billing Disputes	0	0	13	16	16	45
Other	0	0	111	147	33	291
Totals	338	295	436	416	244	1,729

***Definitions** of the categories used above:

Contractual (WDO) –Inspections regarding contracts offered for wood destroying organism (WDO) protection

WDO reports – Inspections regarding WDO inspection report provided for real estate transaction

Lawn/Ornamental/Turf/Limited Commercial – Inspections regarding service provided for lawn and ornamental pest control, including services provided by holders of Limited Certificate for Commercial Landscape Maintenance

Notification – Inspections regarding notice required for persons on the registry of persons requiring prior notification for pesticide application

Exposure – Inspections regarding exposure to pesticide application

Misuse – Inspections regarding pesticide misuse

Preconstruction/Post Construction termite– Inspections regarding treatment of structures for termite protection during construction and treatment of existing structures.

Fumigation – Inspections regarding structural fumigation operations

Illegal/unlicensed ops – Inspections regarding unlicensed operators, license status, or pest control identification cardholders operating independently

Licensee – Inspections regarding requirements for licensed pest control companies, including obtaining identification cards, and training

Certified Applicator Records – Inspections regarding records required for pesticide application

Vehicle – Inspections regarding requirements for vehicle pesticide security and markings

Billing disputes – Inspections regarding charges for services

Length of Time Identification Cardholders Work for a Business Licensee

An analysis of the length of time that identification (ID) cardholders stay with an individual business licensee was conducted for ID cards held for the period of July 1, 2006, to June 30, 2009. Of the 28,351 individuals who held cards issued during this period, 23% stayed with a single business licensee for six months or less, 24% stayed seven to twelve months, 29% stayed thirteen to thirty-six months, and 24% stayed over thirty-six months. (Figure 1, below). This analysis indicates that approximately one-fourth of persons trained and supervised by a business licensee were employed by that licensee for over three years. About half (47%) of the persons performing pest control have less than one year of experience with a single licensee.

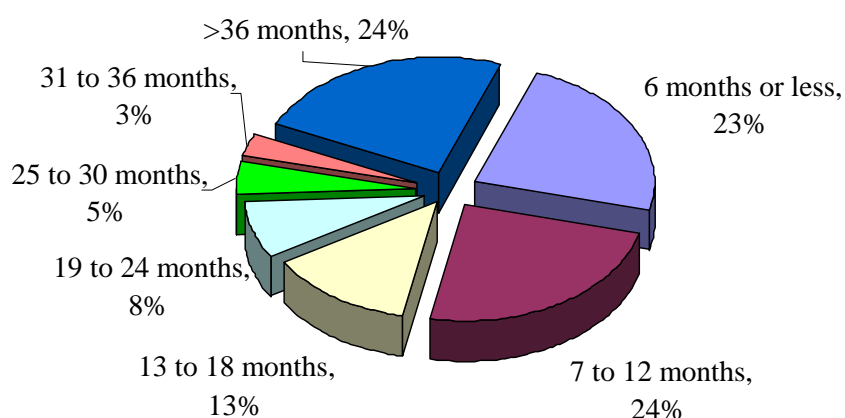


Figure 1. Length of time ID cardholders were employed at a business license location

With this type of repeated turnover, it is imperative that training and supervision be effective to ensure that pest control activities affecting consumers are performed properly. Much of modern pest management is technical and complex. As indicated by the data analysis above, many of the individuals who perform the actual pest control work either stay a short time in the pest control industry or work for different licensees within the industry during a one or two-year time frame. For that reason, it would benefit both the industry and consumers if identification cardholders could be retained within the industry in order to fully master their field.

The current language in section 482.163, F.S., appears to limit the ability of the Department pertaining to administrative action for violations against business licensees and therefore, most enforcement actions focus on individual identification cardholders. Administrative action by the Department is designed to be a “progressive enforcement” system, in which initial violations result in a warning, and subsequent violations result in progressively higher penalties.

Efforts to ensure compliance with pest control regulations within the pest control industry are hampered when enforcement actions are focused on identification cardholders for whom there is a high turnover rate. Disciplinary actions are less meaningful to individuals who do not stay in the industry, and improvements in overall compliance cannot be expected to be a result when new, inexperienced individuals are constantly added to the

workforce. Improved training and supervision of identification cardholders could help to increase compliance; however, the Department reports that under current law, it is very difficult to hold licensees accountable for poor training or supervision programs.

In order to achieve improved compliance, it appears that the focus would need to be directed toward corrective actions against persons who have a larger stake in the performance of the pest control business and who can more effectively improve training and supervision within a pest control business. Providing the Department with statutory authority to take action against the persons who are ultimately responsible for the conduct of a pest control business – the pest control business licensee – would be expected to increase the level of compliance with the state’s structural pest control regulations.

Options and/or Recommendations

Options for Legislative Consideration

Staff of the Agriculture Committee has researched issues pertaining to the responsibility of a pest control business licensee for its employees under the provisions of section 482.163, F.S. The following options have been assessed that the Legislature could consider in its review.

Option 1 - Retain the law as it currently exists. Under this option, the Legislature would provide no additional safeguards to consumers against pest control licensees that are investigated by the Department. Pest control licensees would continue to operate under the same provisions on this issue that were enacted in 1992.

Option 2 - The law could be amended to clarify the current interpretation by the Department of section 482.163, F.S. Under this option, the Legislature would make no substantive changes to the law but could clarify that the statutory phrase, “the licensee may not knowingly encourage, aid, or abet violations of this chapter” means that the Department is correct in its interpretation of the current language, a very high legal standard that requires “clear and convincing evidence”. While clarifying the existing enforcement standard on this matter, no additional safeguards would be provided to consumers against pest control licensees that are investigated by the Department.

Option 3 - The law could be amended to provide a definition of the term “business employee” within section 482.163, F.S. Under this option, the Legislature would define the term to be consistent with that provided to the committee in a letter from the Florida Pest Management Association (appendix item #3). This option would provide no additional safeguards to consumers against pest control licensees that are investigated by the Department, but would provide specificity to the application of this section of law as determined by the FPMA.

Option 4 - The law could be amended in the 2010 Regular Legislative Session as was proposed by the Department for consideration during the 2009 Regular Legislative Session. Under this option, the Legislature would provide additional safeguards to consumers against pest control licensees that are investigated by the Department. The state’s authority to charge pest control licensees for violations by employees would be strengthened.

APPENDIX

FLORIDA STATUTES

Chapter 482

Section 482.163

482.163, F.S., Responsibility for pest control activities of employee.—Proper performance of pest control activities by a pest control business employee is the responsibility not only of the employee but also of the certified operator in charge, and the certified operator in charge may be disciplined pursuant to the provisions of s. 482.161 for the pest control activities of an employee. A licensee may not automatically be considered responsible for violations made by an employee. However, the licensee may not knowingly encourage, aid, or abet violations of this chapter.

Supreme Court of Florida

No. 69,561

THOMAS B. FERRIS, Petitioner,

vs.

RALPH D. TURLINGTON, as the
Commissioner of Education, Respondent.

[July 16, 1987]

BARCKETT, J.

We have jurisdiction under article V, section 3(b)(3) of the Florida Constitution, because of express and direct conflict between Turlington v. Ferris, 496 So.2d 177 (Fla. 1st DCA 1986), and Ferris v. Austin, 487 So.2d 1163 (Fla. 5th DCA 1986).

Thomas Ferris was an elementary schoolteacher in Hernando County. In 1983, the school board filed a complaint against Ferris, seeking his dismissal on charges of immorality based upon allegations of sexual misconduct with a fifteen-year-old male student. (Ferris had pleaded nolo contendere to sexual battery and had been placed on probation for three years with adjudication of guilt withheld.) Thereafter, the Commissioner of Education, Ralph Turlington, filed an administrative complaint seeking revocation of Ferris' teaching certificate.

The two cases were consolidated by stipulation and heard jointly by an administrative hearing officer. As a threshold finding applicable to both proceedings, the hearing officer concluded that Ferris had no sexual contact with the student as alleged. The hearing officer recommended that both the school board's charges and the administrative complaint be dismissed.

The school board rejected the recommended order and dismissed Ferris, finding that the hearing officer incorrectly applied a clear and convincing standard of proof to the evidence and erroneously concluded that corroboration was necessary to sustain the minor's testimony. The school board's order permanently dismissing Ferris was appealed by Ferris, however, and reversed by the Fifth District in Ferris v. Austin. The Fifth District, quoting extensively from the hearing officer's recommended order, determined that "[t]he hearing officer made a clear factual determination that Ferris 'never made any sexual contact with any minor,' and that there was a 'failure of the weight of the evidence to support a factual finding that [the minor's] allegations are true.'" Id. at 1166. The court then concluded that a reading of the recommended order made it apparent that pursuant to "any standard" the evidence supported Ferris, and thus the school board erred in rejecting the recommended order. Id. at 1167.

Conversely, the Education Practices Commission (EPC) adopted the hearing officer's order and dismissed the administrative complaint against Ferris. This order was appealed by the Commissioner of Education to the First District, which in essence agreed with the Hernando County School Board. The First District found that the hearing officer had erred by requiring corroboration of the minor's testimony and by erroneously applying a clear and convincing standard of proof to the evidence.

After reviewing the record, we agree with the Fifth District's analysis of the hearing officer's recommended order in this case. Read in its entirety, it is clear that the hearing officer concluded that under any standard of proof the evidence presented failed to support the allegations of misconduct. The hearing officer unequivocally found that the alleged sexual incident did not occur and took great pains to delineate why he so concluded. The EPC correctly adopted the hearing officer's order and should have been affirmed.

Although we have found that the hearing officer's order is supported under the lesser standard of preponderance of the evidence, we take this opportunity to clarify the issue of the appropriate standard of proof to be applied in the circumstances presented here. As the hearing officer correctly noted:

"Until the court decision in Bowling v. Department of Insurance, 394 So.2d 165 (Fla. 1st DCA 1981), charges to support the revocation of a license had to be proven by clear and convincing evidence. Walker v. Florida State Board of Optometry, 322 So.2d 612 (Fla. 3d DCA 1975). In a proceeding brought to suspend or revoke a real estate license on charges of dishonest conduct, it was determined that the dishonesty must be proven by clear and convincing evidence. Reid v. Florida Real Estate Commission, 188 So.2d 846 (Fla. 2nd DCA 1966). There is confusion since the Bowling decision, in that it is not clear whether the clear and convincing standard was adopted, or whether some higher or lesser standard was intended. Nevertheless, Bowling does state that, 'in a proceeding under a penal statute for suspension or revocation of a valuable business or professional license, the term competent substantial evidence takes on vigorous implications that are not so clearly present on other occasions for agency action under Chapter 120. When the proceeding may result in the loss of a valuable business or professional license, the critical matters in issue must be shown by evidence which is indubitably as "substantial" as the consequences.' Bowling, supra, at 172."

As quoted in Ferris v. Austin, 487 So.2d at 1165.

We agree with the court in Bowling v. Department of Insurance, 394 So.2d 165 (Fla. 1st DCA 1981), that the revocation of a professional license is of sufficient gravity and magnitude to warrant a standard of proof greater than a mere preponderance of the evidence. We cannot subscribe, however, to the nebulous sliding scale standard of evidence as "substantial as the consequences" to be suffered. The correct standard for the revocation of a professional license such as that of a lawyer,¹ real estate broker, or, as in this instance, a teacher, is that the evidence must be clear and convincing.² We agree with the district court in Reid v. Florida Real Estate Commission, 188 So.2d 846, 851 (Fla. 2d DCA 1966), that:

¹ Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970).

² We do not reach the question of the appropriate standard of proof for termination of employment as in Ferris v. Austin, 487 So.2d 1163 (Fla. 5th DCA 1986), because it is not before us.

The power to revoke a license should be exercised with no less careful circumspection than the original granting of it. And the penal sanctions should be directed only toward those who by their conduct have forfeited their right to the privilege, and then only upon clear and convincing proof of substantial causes justifying the forfeiture.

In a case where the proceedings implicate the loss of livelihood, an elevated standard is necessary to protect the rights and interests of the accused.

Accordingly, we quash the decision of the First District Court of Appeal and remand with directions that the EPC's order dismissing the complaint filed by the Commissioner of Education be reinstated.

It is so ordered.

MCDONALD, C.J., and OVERTON, EHRLICH, SHAW, GRIMES and KOGAN, JJ.,
Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF
FILED, DETERMINED.

Application for Review of the Decision of the District Court
of Appeal - Direct Conflict of Decisions

First District - Case No. BH-37

John J. Chamblee, Jr. and Susan E. Hicks of Chamblee & Miles,
Tampa, Florida,

for Petitioner

Sydney H. McKenzie III, General Counsel, and Cecilia Bradley,
Counsel, State Board of Education, Tallahassee, Florida,

for Respondent

Pamela L. Cooper of Meyer, Brooks and Cooper, P.A., Tallahassee,
Florida,

for Florida Teaching Profession-National Education
Association, Amicus Curiae

Thomas W. Young III, General Counsel, FEA/United, Tallahassee,
Florida,

for Florida Education Association/United, AFT, AFL-CIO,
Amicus Curiae

Robert A. Butterworth, Attorney General and Susan Tully Proctor,
Assistant Attorney General, Tallahassee, Florida,

for Education Practices Commission, Amicus Curiae

Dear Senator,

As a Member of the Florida Senate Agriculture Committee, we are contacting you regarding the Committee's Interim Study entitled, "Responsibility for Pest Control Activities of Employees". The Florida Pest Management Association (FPMA) is the State's oldest and largest pest control industry association representing over 500 companies and over a thousand certified operators since 1945.

At the outset FPMA, would like to express its deep gratitude to you for endeavoring to address this issue in an Interim Study. As industry stakeholders, we are committed to the overall integrity of the study and recognize its mission to protect the consumers of professional pest control services throughout Florida.

There are two legal classifications of employees in any Florida pest control company; employees who are independently licensed by the Florida Department of Agriculture Services ("the Department") and those who are not. Identification Cardholders and Certified Operators are company ("licensee") employees who practice pest control and are independently licensed by the Department. Company employees who do not practice pest control, such as administrative assistants and accounting staff, IT personnel, are not required to be licensed or otherwise regulated by the Department.

Under current Florida law, a pest control company (a "licensee") is strictly and automatically liable to the Department for the violations of its employees who are licensed by the Department to practice pest control; ID Cardholders and Certified Operators. And while a pest control company is also liable to the Department for the violations of employees who are not licensed by the Department (accountants and administrative staff) that liability is not automatic and may be imposed only after the Department has met its common law and statutory administrative burden of proof.

There are a few specific references in the cover letter and survey distributed by the Senate Agriculture Committee which do not reflect this fundamental aspect of licensee liability. First, in the Committee's cover letter of July 24 to survey respondents, the first sentence of the second paragraph begins, "It is the position of the Department of Agriculture and Consumer Services that under the provisions of section 482.163, F.S., the Department has limited authority to charge a business license owner with a violation as a result of the activities of an Identification Cardholder." FPMA suggests that this statement does not accurately characterize the current debate or the position of the Department. FPMA believes, and further believes that the Department would concur, that the Department currently has the authority to automatically hold a licensee liable for the violations of its employees who are Identification Cardholders as well as Certified Operators.

Secondly, within the survey itself, the first sentence of the second question begins, "Currently Florida law limits the Department of Agriculture and Consumer Services from charging a pest control business license owner with a violation as a result of the action of an employee." Here, FPMA urges the consideration of this statement with great specificity and particularity. The statement itself is broad and general enough to be considered inaccurate. The only limitation standing between a pest control business licensee and the Department for the violations of ANY employee is the administrative burden the Department must meet before imposing liability on a business licensee for the violations of a non-licensed employee. A pest control business licensee is automatically liable to the Department for the violations of its employees who are also licensed by the Department, ID Cardholders and Certified Operators.

FPMA maintains that the Department's administrative burden for imposing liability on business licensees for the violations of un-licensed, unregulated employees is consistent among other similar regulated industries in Florida, such as pharmacists, realtors, engineers and others. In closing, FPMA urges that any inquiry regarding the administrative liability of Florida pest control licensees for the activities of its employees must consider the distinctions between employees who are licensed and regulated by the Department (ID Cardholders and Certified Operators) and employees who are not.

FPMA would again like to thank the Members and staff of the Senate Agriculture Committee for this endeavor. We look forward to working with you and the other Members of the Senate Agriculture Committee on this issue. Please do not hesitate to contact us with any questions, thoughts or concerns you may have.

Jim Williamson
President
Affairs Committee
Florida Pest Management Association
Association

D.R. Sapp, Jr.
Chairman, Government
Florida Pest Management



Florida Department of Agriculture and Consumer Services
CHARLES H. BRONSON, Commissioner
The Capitol • Tallahassee, FL 32399-0800
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Please Respond to: Anderson Rackley, Director
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3125 Conner Boulevard, Room 130
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Phone 850-488-3731; Fax 850-488-2164

September 1, 2009

Mr. Jim Williamson, President
Florida Pest Management Association
530 Omaha Street,
Palm Harbor, Florida 34683

Mr. D.R. Sapp, Chair
Government Affairs Committee
Florida Pest Control & Chemical Company
Post Office Box 5369
Gainesville, Florida 32627-5369

Dear Mr. Williamson and Mr. Sapp:

The Department has been provided the opportunity to review a letter sent via email to the Senate Agriculture Committee on August 16, 2009. The letter contains a significant misinterpretation of the provisions of Chapter 482.163, F.S. and a misrepresentation of the Department's position that need to be corrected.

The letter from FPMA makes the statement in three places that pest control licensees are automatically "liable" to the Department for violations made by employees "who are licensed by the Department to practice pest control". The letter also states that the licensees are "liable" to the Department for the violations of employees "who are not licensed by the Department", but that this "liability" is not automatic.

The current language of the statute is:

482.163 Responsibility for pest control activities of employee.— Proper performance of pest control activities by a pest control business employee is the responsibility not only of the employee but also of the certified operator in charge, and the certified operator in charge may be disciplined pursuant to the provisions of s. 482.161 for the pest control activities of an employee. A licensee **may not automatically be considered responsible for violations made by an employee.** However, the licensee may not knowingly encourage, aid, or abet violations of this chapter. *History.*—s. 43, ch. 92-203; s. 8, ch. 94-194



Florida Agriculture and Forest Products
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Mr. Williamson and Mr. Sapp
September 1, 2009
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I have bolded the second sentence of the statute, since this is the section that is being misinterpreted in the letter. The existing language of the statute clearly states that the licensee may not automatically be considered responsible for violations committed by an employee.

The term "employees" is defined in Chapter 482 (Section 482.021(7), F.S.) as persons who are provided the means to conduct pest control and who are under the direct supervision of a pest control certified operator. Further, employees who perform pest control are required (Section 482.091, F.S.) to obtain and carry identification cards issued by the Department.

The Department conducts inspections and investigates complaints to determine if pest control is being performed according to the law and rules. These inspections and investigations focus on the employees who conduct pest control. The Department does not waste resources by investigating business employees who do not conduct pest control, precisely because they are not engaged in the practice of pest control.

As we have discussed numerous times, the plain reading of Chapter 482.163, F.S., and the way the Department interprets and implements Section 482.163, F.S., is that disciplinary action can be taken against an identification card holder (employee) or a certified operator for a violation, but that a pest control business licensee may not "automatically" be disciplined for a violation committed by an employee, unless the Department has clear and convincing evidence that the licensee "knowingly" encouraged, aided, or abetted that violation. Clear and convincing evidence of a knowing violation requires written or recorded instructions to commit a violation or an admission that the licensee aided, abetted, or directed the violation. We have discussed many times with FPMA leadership the difficulty in obtaining such evidence.

It is the Department's consistently stated position that the current language shields business licensees from responsibility for the effectiveness of training or supervision of employees. In cases where there are multiple violations of the law or rules, the Department can take disciplinary action against the employee, typically an hourly employee, but can not take action against the business itself, unless we can prove that the business "knowingly" encouraged, aided, or directed the violation.

This is the position that the Senate Agriculture Committee accurately and correctly summarized in the Committee cover letter of July 24, 2009. (*"It is the position of the Department of Agriculture and Consumer Services that under the provisions of section 482.163, F.S., the Department has limited authority to charge a business license owner with a violation as a result of the activities of an Identification Cardholder."*)

The statement in the FPMA letter that follows this statement - *"FPMA believes, and further believes that the Department would concur, that the Department currently has the authority to automatically hold a licensee liable for the violations of its employees who are Identification Cardholders as well as Certified Operators"*, is a complete misrepresentation of the Department's position. We have very clearly stated to FPMA on numerous occasions, and in presentations to the Senate Agriculture Committee, that current law restricts our ability to take disciplinary action against business licensees for the violations committed by employees and it is disingenuous to state the Department's position in any other way.

Mr. Williamson and Mr. Sapp
September 1, 2009
Page Three

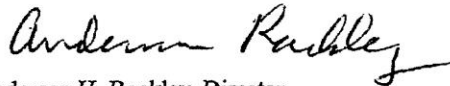
Further, the first sentence in the second question of the Senate Agriculture Committee survey is completely accurate, contrary to the claim in your letter to the Senate. It is the statement made by FPMA in this paragraph of the letter "*A pest control business licensee is automatically liable to the Department for the violations of its employees who are also licensed by the Department, ID Cardholders and Certified Operators*" that is inaccurate.

It is clear, however, that since this statement is repeated three times in your letter, that FPMA believes that business licensees should be responsible for the actions of identification cardholders and certified operators, and that the Department should take administrative action against licensees when lack of supervision and training result in violations of the pest control law or rules. Consequently, FPMA should not object to removal of the language in Chapter 482.163, F.S. that has been interpreted to prevent such action.

I would be very interested in discussing with you how to accomplish this.

Sincerely,

CHARLES H. BRONSON
COMMISSIONER OF AGRICULTURE



Anderson H. Rackley, Director
Agricultural Environmental Services

cc: Commissioner Charles H. Bronson
Terry Rhodes, Assistant Commissioner
Joanne Brown, Deputy Commissioner
Steve Dwinell, Assistant Director AES
Mike Page, Chief, Bureau of Entomology and Pest Control
David McInnes, Legislative Affairs Director
Dale Calhoun, Sr. Executive Assistant

FPMA

Tim Brock, President Elect
George Braker, Vice President
John Cooksey, Treasurer
Billy Riley, Secretary
Tim Hulett, Past President
Allen Fugler, EVP
Matt Dempsey, FPMA Lobbyist

Mike Huey, Attorney
Leslie Foy, Attorney
Chris Gorecki, Orkin

Attachment



MEMORANDUM

TO: Steven Dwinell, Assistant Director,
Division of Agricultural Environmental Services (AES)

COPY TO: Anderson Rackley, Director of AES

FROM: David W. Young, Senior Attorney *DWY*

SUBJECT: Request for an Opinion on Interpretation of Section 482.163, F.S. Relative to Enforcement actions Against Licensees for Violations Committed by Employees

DATE: September 09, 2009

.....
Background: This will acknowledge receipt of your September 4, 2009 memo regarding the meaning of Florida Statute (F.S.) 482.163. The statutory section states:

"Responsibility for pest control activities of employee:-Proper performance of pest control activities by a pest control business employee is the responsibility not only of the employee but also of the certified operator in charge, and the certified operator in charge may be disciplined pursuant to the provisions of s.482.161 for the pest control activities of an employee. A licensee may not automatically be considered responsible for the violations made by an employee. However, the licensee may not knowingly encourage, aid, or abet violations of this chapter. History.--s.43, ch.92-903; s.8, ch.94-194." (emphasis added).

You note in your memo that it has been the operating policy of the Department that the existing language of the above statute clearly provides that a licensee may not automatically be considered responsible for violations made by an employee and because of this, enforcement against a licensee cannot be sustained unless there is "clear and convincing" evidence that a licensee has knowingly encouraged, aided or abetted an employee in violating Chapter 482.

.....
Department of Agriculture and Consumer Services
Office of the General Counsel, Suite 520 - Mayo Building, Mail Stop M-11
Telephone: 850/245-1000 Facsimile: 850/245-1001

Question: You request that I advise whether the above described operating policy is founded upon a sound understanding of the above statute.

Answer: Yes, the above described operating policy is founded essentially upon a sound understanding of F.S. 482.163. Chapter 482 imposes the primary responsibility for supervision and training of pest control employees upon trained and skilled certified operators (COICs) in charge of each category of pest control engaged in by the licensee. A "licensee" is defined by F.S. 482.021 (17) as "a person, partnership, firm, corporation, or other business entity having a license issued by the department for engaging in the business of pest control at a particular business location." A licensee in order to do business must have a COIC for each category of pest control engaged in by the licensee at each business location and pursuant to the provisions of F.S. 482.121 the licensee must make certain that the COIC is in charge of the pest control activities in the category or categories of pest control of the licensee covered by the certificate. The licensee, however, does not have any statutorily imposed duty to make sure that the COIC is performing his/her duties properly. A licensee is in the very limited circumstances described in F.S. 482.111 (6) (c) when a certified operator is designated temporarily in charge in place of the COIC "jointly responsible [with the designated certified operator] for the pest control work performed and for compliance with other provisions of this chapter and of the rules adopted pursuant to this chapter."

Discussion: While Chapter 482 discusses various requirements and duties of the licensee, the licensee's responsibility for the performance of pest control by its employees is focused mostly on making certain that it has a qualified and trained person in charge of pest control activities for every category of pest control that it performs at any business location. A licensee may be an individual, partnership or other fictitious legal person such as an LLC, LLP or corporation. A licensee is not required to have any specific pest control knowledge, training or expertise in any category of pest control to acquire a business license. The licensee in order to do business, however, must, pursuant to F.S. 482.111 (6) (a), have for each licensed business location a certified operator in charge (COIC) registered with the department for each category of pest control "engaged in at that location." The Department has established in F. S. 482.11 and Department rules adopted pursuant to Chapter 482, including Rules 5E-14.117 and 5E-14.123, specific requirements for obtaining a pest control operator's certificate in four different categories of pest control including fumigation, general household pest control, lawn and ornamental pest control, and termites and other wood-destroying organisms pest control. The requirements include work experience, education and passing a written examination administered by the Department for each category of pest control.

F.S. 482.071 (2) (e) provides:

"The department may not issue or renew a license to engage in pest control business unless the applicant's pest control activities are under a certified operator or operators in charge who are certified in the categories of the licensee."

F.S. 482.111 provides that the business licensee may in all categories of pest control except fumigation get an emergency certificate for any identification cardholder for a period not exceeding 30 days to enable the licensee to continue performing pest control in a particular

category until a permanent COIC can be hired. The sum of periods for which the emergency certificate can be renewed may not exceed one year during any 3 year period except in case of the death of a COIC in which case emergency certificates can be issued for up to 120 days.

F.S. 482 .111 (6) (c) provides:

“A certified operator may not be in charge of the performance of pest control activities at more than one business location for a licensee; however, the department shall prescribe by rule that, during the temporary absence of the certified operator currently registered in charge of a licensed business location, the licensee may, for a period not exceeding 30 days, designate another certified operator, certified in the same categories as the certified operator in charge, to be in charge of and responsible for performing those duties requiring the physical presence of a certified operator in charge. **In any case, the certified operator designated temporarily in charge and the licensee are jointly responsible for the pest control work performed and for compliance with other provisions of this chapter and of the rules adopted pursuant to this chapter.**”(emphasis added)

Pursuant to the provisions of F.S. 482.121 (1) a certified operator may not allow his certificate to be used by a licensee to keep a license unless:

1. She/he is in charge of the pest control activities of the licensee in the category or categories covered by his certificate;
2. He /she is a full time employee of the licensee;
3. Her/his primary occupation is with the licensee.

Pursuant to F.S. 482.121 (2) a licensee “may not misuse the certificate of any certified operator to secure or keep a license **unless the holder of the certificate is in charge of the pest control activities in the category or categories of the pest control activities of the licensee covered by the certificate.**” (emphasis added)

Pursuant to F.S. 482.121 (3) the department may revoke the license of the pest control business or the certified operator’s certificate if the certificate is used in violation of F.S. 482.121. The licensee has a duty under this section to make sure that it not only has a certified operator in charge (COIC) at each business location for each category of pest control that it engages in at that location but it must make certain that the COIC for each category of pest control is in charge of the pest control activities in the category or categories covered by the certificate. The fulfillment of that duty is a serious obligation and failure to fulfill that duty may result in the revocation of the business license. The Department has taken action successfully against licensees and COICs who have failed to perform their duties under F.S. 482.121.

The duties of the certified operator in charge are spelled out in F.S. 482.152:

“A certified operator in charge of the pest control activities of a licensee shall have her or his primary occupation with the licensee and shall be a full time employee of the licensee, and her

or his principal duty shall include the responsibility for the personal supervision of an participation in the pest control activities at the business location of the licensee as the same relate to :

- (1) The selection of proper and correct chemicals for the particular pest control work performed.
- (2) The safe and proper used of the pesticides used.
- (3) The correct concentration and formulation of pesticides used in all pest control work performed.
- (4) The training of the personnel in the proper and acceptable methods of pest control.
- (5) The control measures and procedures used.
- (6) The notification of the department of any accidental human poisoning or death connected with pest control work performed on a job she or he is supervising, within 24 hours after she or he has knowledge of the poisoning or death."

The provisions of F.S. 482.163 have to be considered together with these other provisions of Chapter 482 that discuss who is responsible for the supervision and training of the pest control activities of the employees who perform pest control. Clearly Chapter 482, including F.S. 482.163 places the primary responsibility for the supervision, training and performance of pest control by employees upon the COIC of the particular category of pest control that is being performed. As stated in F.S. 482.163 in pertinent part:

"Proper performance of pest control activities by a pest control employee is the responsibility not only of the employee but also of the certified operator in charge, and the certified operator in charge may be disciplined pursuant to the provisions of s.482.161 for the pest control activities of an employee."

This is consistent with the other provisions of Chapter 482 referred to above. If it can be proven that an employee's failure to properly perform pest control in violation of the provisions of Chapter 482 or Department rules adopted pursuant to the chapter is the result of the COIC's failure to perform a statutory duty to supervise and train the employee, to select the proper and correct chemical to be used for the particular pest control work performed, or the correct concentration and formulation of pesticide used for the work performed, then the COIC is also responsible along with the employee and can be charged with a disciplinary violation pursuant to the provisions of F.S. 482.161.

As stated above the licensee does have a limited duty with regard to the performance of pest control pursuant to F.S. 482.121 (2). Not only does the licensee have to have a COIC for each business location in each category of pest control engaged in at that location, he also has a duty to see that the COIC is actually "in charge of the pest control activities in the category or categories of the licensee covered by the certificate." Failure to discharge that duty may result in severe disciplinary action, including revocation of the business license as specifically provided in F.S. 482.121 (3). Much of the emphasis of Chapter 482 is placed upon the retention of qualified COICs for each business location and those COICs performing their statutory duties.

Unlike the COIC, the licensee is not required to be trained or knowledgeable in pest

Control and indeed a legally created person like a corporation could never be knowledgeable or trained except through its employees. The licensee has no statutory duty with regard to any employee to train or supervise him or her in the performance of pest control other than to make sure that the COIC is in charge of the pest control activities in the category or categories of the license covered by the certificate. The licensee's responsibility for the pest control activity of employees pursuant to F.S. 482.163 is one of abstaining from doing intentional wrong:

"A licensee may not automatically be considered responsible for violations made by an employee. However, the licensee may not knowingly encourage, aid, or abet violations of this chapter."

In order to impose penalties under F. S. 482.161 including but not limited to fines, suspension or revocation of a license the Department has the burden of proving a violation of Chapter 482 or Department rules adopted pursuant to the Chapter by "clear and convincing evidence." See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla.1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); and Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998).

"Clear and Convincing" evidence is a high standard. It has been described as follows:

"[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established."

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

Summary and Recommendations:

The Division's operating policy that enforcement action against a licensee pursuant to F.S. 482.163 cannot be sustained unless there is clear and convincing evidence that a licensee "knowingly" encouraged, aided or abetted violations of Chapter 482 is essentially correct. Taken as a whole Chapter 482 places the primary burden for seeing that pest control is performed properly upon COICs certified by the Department who are required to meet certain levels of training, education, experience and pass a written test administered by the Department.

The licensee can be disciplined pursuant to F. S. 482.121 (2) for failing to see that the COIC is "in charge of the pest control activities in the category or categories of the license covered by the certificate." This includes possible revocation of the license pursuant to F. S. 482.121 (3). However, if the COIC is "in charge" there is no provision for requiring the licensee to oversee the COIC and make sure that he is performing his duties properly. The licensee may also in limited circumstances be jointly liable with the certified operator designated temporarily

in charge for pest control work performed and for compliance with other provisions of Chapter 482 and Department rules adopted pursuant to Chapter 482.

The problem facing the Department in enforcing Chapter 482 and rules adopted pursuant to the chapter is the reality that the licensees as owners have the ultimate control over the operations of the pest control businesses. The licensees earn the profits and are responsible to the customers they serve. Licensees hire the COICs that serve under them. While the COIC may have the statutorily imposed duties to supervise and train pest control employees, the licensee by virtue of his/her/its hiring and firing authority can dictate in large part what the COICs do and what the pest control employees of the company do. It is difficult from an evidentiary standpoint to connect the wrongful acts of an employee to the business licensee. The employee knows that in most circumstances all that the Department will probably do is fine him or suspend his credentials for a brief time if he is found guilty of violating a provision of Chapter 482 or a rule adopted pursuant to the Chapter. In some cases the licensee may even help the employee pay the fine or assist the employee while he is suspended. The licensee has the ability to fire the employee and take away his/her livelihood, which is much more persuasive than what the Department normally can do through the disciplinary process.

The Department does not have the resources to be a policeman checking on the activities of the pest control employees of licensees to make sure that they are doing what they are supposed to be doing when the licensee often has little incentive to do this and in some types of pest control has an economic incentive to cut corners to save costs. There are less than 20 field inspectors in the Bureau of Entomology and Pest Control to help regulate and enforce the Structural Pest Control Act, Chapter 482, F.S. in the State of Florida. Even if there were resources to hire more inspectors, it is not practical to think that the industry can be properly regulated and the consumers adequately protected unless the licensees themselves are constrained to bear responsibility for what their pest control employees do. The most practical way to accomplish this is to make licensees statutorily responsible for the pest control violations of their employees. Licensees must realize that by virtue of being granted a pest control business license they are responsible for what their employees do when they perform pest control. If an employee is found to have violated a provision of Chapter 482 or a rule adopted pursuant to the chapter, then the licensee will be found to have committed a violation also and will be subject to discipline. As owners of the pest control businesses they must take all necessary steps to police the actions of their employees to eliminate violations of Chapter 482. While it is true that there are rogue employees who despite proper training break the rules when left on their own, the licensee has more authority and ability to control this than the Department does. The licensee selects the employees that he hires. He can terminate or discipline an employee for poor job performance including violating provisions of Chapter 482 and Department rules. The licensee can implement a program to check on the job performance of employees to make sure they are complying with pest control laws.

As matters presently stand, licensees in most instances are not disciplined when their employees commit violations. A licensee's name is not even listed on the quarterly disciplinary report pursuant to F.S. 482.161 (9) when one of his/her/its employees commit a violation. A licensee's employees may have numerous violations while the licensee skates free, even though there obviously may be a problem with the way the licensee does business.



**THE FLORIDA SENATE
COMMITTEE ON AGRICULTURE**

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Senator Larcenia J. Bullard, *Vice Chair*

Professional Staff: Jeff Poole, *Staff Director*

Senate's Website: www.flsenate.gov

August 4, 2009

The Florida Senate Committee on Agriculture has been directed to prepare a report entitled "Responsibility for Pest Control Activities of Employees" for consideration during the 2010 regular legislative session. I need your input.

It is the position of the Department of Agriculture and Consumer Services that under the provisions of section 482.163, F.S., the Department has limited authority to charge a business license owner with a violation as a result of the activities of an Identification Cardholder. The Department has requested that the law be amended to allow charges to be filed against a pest control business licensee in some cases.

Enclosed is a short questionnaire. Your response would help the committee in its deliberation on this matter. Your response is important. You are one of a small number of people chosen at random from which we are asking information. You can respond online at www.oppage.state.fl.us/nosearch/surveys/pestcontrol.htm or by returning your response in the postage-paid envelope enclosed. Please respond by August 14, 2009.

You have been assigned a survey identification number. The survey identification number is for tracking purposes only. We will not identify individuals with their responses. The identification number allows us to check your name off the mailing list to avoid contacting you after you have already responded. Thank you for your cooperation.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles S. Dean, Sr.", is written over a circular stamp that partially overlaps the signature.

Charles S. "Charlie" Dean, Sr.
Chairman, Committee on Agriculture

JEFF ATWATER
President of the Senate

MIKE FASANO
President Pro Tempore



Florida Senate

Questionnaire for Pest Control Owners and Employees

The Florida Senate Committee on Agriculture has been directed to prepare a report on the responsibility for pest control activities of employees for consideration during the 2010 regular legislative session. You are one of a few people selected at random to provide input. It is important that you respond to this short survey so that the results will represent the opinions of those working in the pest control industry. You can complete this survey online by going to www.opaga.state.fl.us/nosearch/surveys/pestcontrol.htm or by returning this questionnaire in the enclosed postage-paid envelope. We need your response by August 14, 2009.

The survey identification number is for tracking purposes only. WE WILL NOT IDENTIFY INDIVIDUALS WITH THEIR RESPONSES. The identification number allows us to remove you from our mailing list when you respond and not contact you further.

SURVEY ID # _____

1. Do you have a business license, operator certification, or employee identification card? (Mark [x] all that apply.)

- ☐ **Business License Owner**
- ☐ **Certified Operator**
- ☐ **Pest Control Employee Identification Card**

2. Currently Florida law limits the Department of Agriculture and Consumer Services from charging a pest control business license owner with a violation as a result of the action of an employee. In your opinion, when should a pest control business licensee be able to be charged with a violation for the actions of an employee? (Mark [x] one.)

- ☐ **Never** – Thank you for your opinion. Please return your response in the postage-paid envelope.
- ☐ **For any offense resulting from the actions of an employee** – Thank you for your opinion. Please return your response in the postage-paid envelope.
- ☐ **Under certain circumstances when an offense results from the actions of an employee**
Please answer question 3.

3. Under which of the following circumstances should a pest control business license owner be able to be charged with a violation for the actions of an employee? (Mark [x] all that apply.)

- ☐ **When the employee is acting within the duties of his/her employment**
- ☐ **When the employee is following company policy**
- ☐ **When the employee has received inadequate training**
- ☐ **When the employee was inadequately supervised**
- ☐ **Other:** _____

Thank you for your opinions. Please return your responses in the postage-paid envelope.

Appendix #7

